Atlantic Limousine, Inc. *and* Teamsters Union No. 331 Affiliated with International Brotherhood of Teamsters, AFL–CIO. Cases 4–CA–21505, 4–CA–21552, 4–CA–21697, and 4–CA–21740

April 30, 1999

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On February 26, 1998, Administrative Law Judge Richard H. Beddow Jr. issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.[1] The Acting General Counsel filed a cross-exception and supporting brief, and an answering brief to the Respondent's exceptions. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the judge's supplemental decision and the record in light of the exceptions, cross-exception, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.

1. The Respondent has excepted to the judge's approval of the backpay specification as applied to claimant Louis Babich. Specifically, the Respondent contends that the judge erroneously found that Babich had no interim earnings for the first quarter of 1993, despite his admission that during that period he leased a taxi and presumably should have had some interim earnings from self-employment. The Respondent also argues that there is no explanation for the significant dropoff in Babich's earnings from self-employment in the first quarter of 1994. We find no merit in these arguments.

The Respondent bears the burden of establishing affirmative defenses that would mitigate its backpay liability; such defenses include establishing interim earnings to be deducted from backpay and demonstrating that Babich willfully concealed interim earnings.[3] All the Respondent has done, however, is suggest that Babich *might have* concealed such earnings. Other plausible explanations exist for the interim earnings figures claimed in the backpay specification. Thus, Babich may have paid more to lease the taxi than he received in fares during the first quarter of the backpay period, and therefore would have had no interim earnings for that period. And, as the General Counsel notes, Babich bought a car for use in his business in late 1993; the payments on the car may account for much of the reduction in his interim earnings for the first quarter of 1994. Finally, the Respondent has not shown either what it contends the correct figures should be[4] or that Babich deliberately attempted to deceive the Board.[5]

2. The judge found, and we agree, that Victor Jenkins' lack of interim earnings for the backpay period of May 31, 1993, through January 17, 1994, was not indicative of an unreasonable search for employment related to his care for his mother who was suffering the effects of strokes. The judge noted that Jenkins searched for work by such means as newspaper ads, walking into businesses to apply for work, networking, sending out resumes, and applying at competitors' limousine services. He also noted that, although Jenkins said it would have been "real difficult" to both care for his mother and work, he was nevertheless available for work "mostly at night." The judge found that when Jenkins found full-time employment in January 1994, he was able to make other arrangements for his mother's care. He concluded that Jenkins was, therefore, available for work during the backpay period and that he did not willfully incur loss of income.

Our dissenting colleague asserts that Jenkins' own testimony undermines the judge's finding. He points to Jenkins' testimony that he sought work for a period of 3 weeks (during the 7 months of unemployment) and that he was available mostly at night after his mother came to live with him. This testimony was elicited on cross-examination. However, on redirect examination, when Jenkins was asked if he searched for work beyond the first 3 weeks of his 7 months of unemployment, Jenkins answered: "Oh, yes, yes. Absolutely. Mostly what I did then, because I was taking care of my mother, I did it by way of letter." (Tr. 48:14–19.) When Jenkins' testimony is reviewed as a whole, we find that the statement that he sought work for 3 weeks alone does not give the complete picture and does not undermine the judge's conclusion that Jenkins made a good-faith effort to find work.

As to Jenkins' testimony concerning his availability mostly at night, the judge took this into account and found that it was not indicative of an unreasonable search for employment. The judge reasoned that, because Jenkins was able to make other arrangements for his mother's care when his search for employment was successful in January 1994, he was available for work during the backpay period. We agree with the judge's reasoning, particularly in light of the Respondent's failure to

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] *Paper Moon Milano,* 318 NLRB 962, 963 (1995). When ambiguities or uncertainties exist, doubts should be resolved in favor of the wronged party rather than the wrongdoer. Id.

[4] The Respondent, not the General Counsel, has the burden to prove interim earnings. *Iron Workers Local 373 (Building Contractors),* 295 NLRB 648, 655 (1989).

[5] See *Paper Moon Milano,* supra, 318 NLRB at 965.

show that Jenkins turned down job possibilities or failed to apply for available positions because they were day work. As we observed earlier, the Respondent bears the burden of establishing affirmative defenses that would mitigate its backpay liability. This includes the burden of establishing willful loss of earnings.[6]

3. The judge found that an admission of underreporting tips to the Internal Revenue Service (IRS) does not preclude such tips from being considered and included in a backpay award. He awarded the tip-income amount set out in the backpay specification and recommended that a copy of the Supplemental Decision be furnished to the IRS. We agree with the judge's analysis of this issue which accords with Board precedent. In *Hacienda Hotel & Casino,* 279 NLRB 601 (1986), the Board found that to compute a discriminatee's backpay on the basis of income reported to the IRS would frustrate the purpose of the Act by allowing the Respondent as wrongdoer to benefit from the discriminatee's failure to accurately report tip income to the IRS. The Board noted that the issue of the discriminatee's accuracy in completing income tax returns is a matter of public record and best left to the IRS which will be furnished with a copy of the Board's decision. Unlike our dissenting colleague, we adhere to this precedent.

Our dissenting colleague finds fault with the judge's calculations, even assuming the employees are entitled to claim tip income. He believes that the judge should have explained why he accepted the backpay specification amount. We find the judge gave an adequate explanation of his determination.

The judge found that the Respondent offered an estimate of tips at least half of that suggested in the specifications but did not explain how it calculated these amounts. Thus, he found that the Respondent failed to offer convincing evidence that tip earnings were lower than those included in the backpay specification. The judge noted the employees' testimony of tip amounts higher than those set forth in the backpay specification, but found that the compliance figures were not unreasonable or inaccurate.

The judge's reasoning accords with precedent. The Board requires only that the amount alleged in a backpay specification be a reasonable approximation.[7] The compliance figures here fall within the middle range of the tip income claimed by the discriminatees in their testimony. In these circumstances, the judge's finding that the backpay specification figures were not unreasonable or inaccurate is sound.

4. The Acting General Counsel contends that the judge's factual findings regarding discriminatee Glenn Gerrity's backpay are correct but that the correct calculation of Gerrity's backpay yields a figure of $1,107, plus interest rather than the judge's figure of $1,139.68. Thus, the Acting General Counsel argues that using the multiplier of 1.8 weeks which represents Gerrity's backpay period of March 10 to 22, 1993, yields the following totals:

1.8 wks x 37.93 reg hrs/week x $2.38/hr = $162.49 reg wages		
1.8 wks x 9.4 o/t hrs/wk x $4.91 hr = 83.08 o/t wages		
1.8 wks x $300 tips/wk	=	540.00 tips
TOTAL DISCHARGE BACKPAY		$785.57
REDUCTION IN HOURS BACKPAY		321.43
GRAND TOTAL		$1,107.00

We find merit in the Acting General Counsel's cross-exception and shall modify the judge's recommended Order accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Atlantic Limousine, Inc., Atlantic City, New Jersey, its officers, agents, successors, and assigns, shall make whole the individuals named below, by paying them the amounts following their names, with interest to be computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), minus tax withholdings required by Federal[8] and state laws:

Babich, Louis	$ 9,755.99
Gerrity, Glenn	1,107.00
Jenkins, Victor	22,507.74
Pizzutillo, Joseph	108.24
Purcell, Henry	17,296.73
TOTAL	$50,775.70

MEMBER HURTGEN, dissenting in part.

I agree with the majority's adoption of the judge's findings in this case, except as to the amount of backpay awarded Victor Jenkins, and the amount of tip income awarded Victor Jenkins, Glen Gerrity, and Henry Purcell.

Victor Jenkins was unlawfully discharged on May 31, 1993, and declined a valid offer of reinstatement on January 17, 1994. In the meantime, he had no interim earnings. Although the judge found that Jenkins had made an adequate search for employment throughout the backpay period, Jenkins' own testimony undermines this finding. When asked the period for which he had sought work, Jenkins responded that it was about 3 weeks. This would take his search for work only to the latter part of June 1993. It was about that time that Jenkins' mother

[6] 318 NLRB at 963.

[7] *Hacienda Hotel & Casino,* supra, 279 NLRB at 603.

[8] In accordance with *Hacienda Hotel & Casino,* 279 NLRB 601 fn. 4 (1986), a copy of this Supplemental Decision and Order shall be furnished to the Internal Revenue Service.

came to live with him, suffering from the effects of several strokes. Thereafter throughout the second half of 1993, much of Jenkins' time was devoted to caring for his mother. According to his own testimony, this limited his availability for working, and his looking for work, to "mostly at night" times.

The majority notes that, as of January 17, 1994, Jenkins was able to secure other arrangements for his mother's care. He was therefore able to obtain employment as of that time. However, the period in dispute herein is the period *prior* to January 17. Thus, Jenkins' success in obtaining alternate care arrangements and a job on and after January 17 does not aid the majority's case. To the contrary, those facts support the proposition that, prior to January 17, Jenkins was unable to secure alternate care arrangements and was thus precluded from working during the day.

In sum, Jenkins placed limitations on the times at which he would work and the times during which he would search for work. Inasmuch as his prior employment was during the day, he was not privileged to seek only night work. The fact that he had a personal reason for imposing that limitation on himself is not a basis for making Respondent pay for the consequences of that limitation. In light of the above, I would not order backpay for the last half of 1993.

Contrary to the judge and the majority, I would also not award to Jenkins, Purcell, and Gerrity the tip-income amount set out in the backpay specification. The judge found that the discriminatees, while employed by Respondent, failed to report the amount of tip income on their Internal Revenue Service tax returns. He went on, however, to state that "if the credible evidence otherwise establishes that the discriminatees received tips in excess of those reported to the IRS," then the backpay will include such tips.

I would not permit the employees to now claim that they earned tip income. The Board, in fashioning remedies, must take cognizance of other Federal laws.[1] If employees fail to report tip income to the IRS, I would not now permit them to claim that income simply because it becomes beneficial for them to do so.

Further, even assuming that the employees are now entitled to claim tip income, the judge's calculations are in error. The Respondent asserted that the tip income was about one-half of what the backpay specification alleged. On the other hand, the employees testified that their tips were considerably in excess of the amounts alleged in the specification. The judge did not specifically discredit either claim. Instead, he simply awarded the specification amount. I believe that the judge should have explained his rejection of the figures set forth by the Respondent and the employees, and should have explained why he accepted the specification amount.

My colleagues seek to supply a rational that the judge failed to give. I think that the trier of fact should explain his decision, and the Board should then review that explanation. In any event, the explanation does not withstand scruitiny. My colleagues say only that the chosen figure is "within the middle range of the tip income claimed by the discriminatees." If the problem were a disparity among employee claims, I might agree that choosing a middle range among these claims would be reasonable. However, the problem here is a disparity between employee claims and Respondent claims. That disparity is not resolved.

[1] *Southern Steamship v. NLRB,* 316 U.S. 31 (1942). See also dissent *in Hacienda Hotel & Casino,* 279 NLRB 601 fn. 4 (1986).

Margaret McGovern, Esq., for the General Counsel.
Michael E. Heston and *Angelo J. Genova, Esqs.,* of Livingston, New Jersey, for the Respondent.

SUPPLEMENTAL DECISION

I. STATEMENT OF THE CASE

RICHARD H. BEDDOW, JR., Administrative Law Judge. This matter was heard in Philadelphia, Pennsylvania, on October 16, 1997. The parties agreed to terms for the closing of the record without the necessity of obtaining testimony from discriminatee Glen Gerrity, who was unavailable at the time of the hearing, and the record in the proceeding subsequently was closed by Order dated December 3, 1997. On January 16, 1995, both the General Counsel and Respondent filed briefs and by letter dated January 29 the General Counsel noted that discriminatee Glen Gerrity had five heart attacks by March 19, 1993, and stipulated that the backpay period for Gerrity should be cut off March 22, 1993, 3 days after the last onset of that illness.

This proceeding is based upon backpay specification dated May 28, 1997, enforcing the backpay provisions of the Board's Decision and Order dated March 24, 1995, 316 NLRB 822, which requires the Respondent to make whole discriminatees Louis Babich, Victor Jenkins, and Glen Gerrity, Joseph Pizzutillo and Henry Purcell for their loss of earnings and benefits resulting from Respondent's unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Upon review of the backpay specification, the Respondent's answer, the evidence stipulated to or presented at the hearing and the respective briefs, it appears that the primary issues are whether discriminatees Babich, Jenkins, and Purcell were available for work or failed to mitigate damages by not making an adequate search for work and whether the tip calculations for Jenkins and Purcell should be reduced.

II. FACTUAL BACKGROUND

Respondent operates a limousine service in and around Atlantic City, New Jersey. Its clients include casinos (casino contracts provide the bulk of its revenues), other business enterprises, and individual casino patrons and the discriminatee were all employed as limousine drivers. In the underlying unfair labor practice decision, the administrative law judge found that "tips form an important part of a driver's compensation since each driver's base wage is only $2.38 an hour." Respondent itself also acknowledged that tips are the mainstay of the drivers' earnings and, in a document it gave to its drivers dur-

ing the union campaign it discussed what the Union was saying and stated:[2]

> In our case, Local 331 keeps harping on the number $2.38, like that is all you make an hour. You know that you make many times that if you factor in:
>
> a. your tips;
> b. the money we pay if a trip is canceled;
> c. the money you receive for waiting time;
> d. the money you receive if the tip is too low or you receive no tip at all. (No other company anywhere does this)
> h. Gratuities that we insist be added to all casino contracts for all employee and entertainer runs.

Tips are received when individual limousine patrons pay their fares directly to the drivers and generally tip in cash. Also, certain corporate and business clients have a contractual relationship with Respondent and are billed for limousine services with charges that include a preset gratuity for driver, which is distributed to the driver as a component of his next regular payroll check. Discriminatee Jenkins testified that this type of preset, contractual tip received in a driver's regular paycheck is known as a "tip on the bill." Leon Geiger has been the Respondent's general manager for 15 years and is familiar with the Employer's payroll records and documentation concerning wages and tips. Since 1988, it has been the Respondent's practice of the Employer to provide each driver a form entitled "Drivers Pay Information" and to require the employee to sign the document acknowledging that the employee understands the rates of pay, pay practices and pay procedures for drivers. This form advises employees that drivers are paid an hourly minimum wage rate with an additional one half of that hourly wage rate reported as income for tax purposes only. Thus the tip (a preselected value), is applied to the driver's salary for wage and hour calculations. Employees receiving in excess of $2.38 per hour in tip income purportedly are required to report such excess income to the Employer to be reported for income tax purposes. If an employee is tipped less than $2.38 per hour the Employer has directed employees to report this to the Employer and the Employer will add the difference to their pay check in order that the Respondent may comply with federal tax requirements. Employees complete time sheets indicating the trips driven and the hours worked and employees are directed to report cash tips received in excess of $2.38 per hour on the bottom of the timesheet. Since 1992, it has been the Employer's practice to "require" all employees to sign weekly tip declarations forms. If a driver is assigned a run under a company or casino contract the built-in gratuity is given to the employee through his regular paycheck. The Employer adds this built-in gratuity to the right hand column of the driver's timesheet and drivers are advised never to report cash tips received in excess of one half the minimum wage in the right hand column of the time sheet. Those amounts assertedly are reported on the tip declaration report and signed weekly by drivers. These tips are also included on the weekly payroll register and on the employer pay stubs.

The employer provided payroll records for 1992 and 1993 to the Regional Office showing a wage rate for drivers consisting of $2.38 per hour in wages and $2.37 per hour in tips, plus higher earning rates for overtime hours. The payroll records and the W-2s for those years also reflect tips paid them and reflected in the weekly tip declaration report. If a driver disagrees with the tip deduction form, they are instructed not to sign it and report the discrepancy to management so that it can be resolved by credit card and any additional tips declared by the employees to the Employer.

Victor Jenkins began working for the Respondent in January 1992 and he suffered an unlawful reduction in his hours between March 28 and April 25, 1993. The Respondent does not dispute the backpay claim for this period as set forth in the compliance specification. Jenkins also was unlawfully discharged on May 31, 1993, and he is entitled to backpay from that date until he declined a valid reinstatement offer on January 17, 1994. The compliance specification cites weekly tip earnings of $360 for the period following discharge, while Respondent contends that the figure should be $158.

Jenkins testified that, prior to his discharge, he worked 6 days per week for Respondent and that he earned an average of $450 per week in cash tips. In the underlying unfair labor practice proceeding (either during the investigation stage in 1993 or the 1994 trial), Jenkins provided the Regional Office with a copy of a tip record from his last week of employment with Respondent, the week of May 17 to 23, 1993. He testified in the compliance hearing that this document was completed on a daily basis over the course of that last week of work. This document shows tip earnings for 11 trips with individual customers ranging from a low of $10 for a 13-mile trip to a high of $80 for a 160-mile trip, totaling $430 in cash tips for that 6-day workweek. Jenkins testified that during the week prior to this discharge, Manager Carl Geiger asked him how much money he made per week and when Jenkins answered "About $600." Geiger said that it "sounded about right." The report actually submitted to the Employer for that period indicated no cash tips and Jenkins did not submit his timesheet for that week. Rather, the tip declaration sheet for that same week signed by Jenkins indicated a total of $130 in tips.

Jenkins testified that he searched for work by various means, such as newspaper ads, walking into businesses to apply for work, and networking or asking people if they knew of any positions available. He also sent out resumes and applied in person at several competitors' limousine services, including Enchantment, and Jonathan's Limousine Service, as well as at the Trump, Harrah, and Showboat casinos. Jenkins also searched for work in the field of human resources and visited human resources department at the casinos and elsewhere seeking employment opportunities and/or leads for jobs. Jenkins testified that he expected to get another job as a limousine driver quickly and when he didn't, thought that he might be "blackballed." At the end of June after he became unemployed Jenkins' mother, suffering the effects of strokes, came to stay with him. He asserts that he continued to search for work and to be available for work while she was with him. He also said it would have been "real difficult" to do both but testified that he then was available "mostly at night" because of his mothers daytime care needs. Jenkins thereafter found and accepted full-time employment in mid-January 1994, while his mother was still in his home.

Henry Purcell worked for the Respondent August 1992 to April 1993. The compliance specification sets forth a backpay period for Purcell between his unlawful discharge on April 23, 1993, and January 17, 1994, when he declined reinstatement.

[2] In accordance with the General Counsel's request, I take official notice of G.C. Exh. 20 and 11 from the underlying proceeding.

Respondent does not contest these dates but contends that Purcell made an inadequate search for interim work and it also contends that the tips set forth in the specification should be reduced.

The compliance specification assert that Purcell is entitled to $325 per week in tip earnings for the backpay period. Purcell testified that he normally earned from $50 to $80 a day in tips, primarily in cash, which he concededly did not report to the Internal Revenue Service. Respondent's Answer contends that Purcell should receive $115 in tips based on his tax records.

Purcell testified that he began to search for work "soon after" his late April discharge by responding to newspaper ads and making personal visits to apply for work, mainly as a driver. He also signed up for training at the unemployment offices and was always available for his regular work (he had one short-term job during the summer of 1993). Purcell testified that he kept calling back to named casinos on a regular basis looking for work as a driver. He applied at the Tropicana and checked back every week until he was eventually hired in 1994 and where he was still employed at the time of the hearing.

The compliance specification alleges that Louis Babich is entitled to backpay for the period February 26, 1993, to January 17, 1994. Babich testified that upon his termination, he started to drive a taxi in Atlantic City, New Jersey, and did not apply for work with any other employer. He further testified that he started his own business in April or May 1993.

The specification shows that Babich has interim earnings totaling $8,927.29, which diminishs the gross backpay owed by Respondent by nearly half. The spread of the interim earnings over the backpay period indicates that his earnings increased over time and there is no backpay claim for the fourth quarter of 1993 (and there is no "tip" issue regarding Babich).

The unfair labor practice decision found that Glen Gerrity's hours were unlawfully reduce for the two weeks ending February 28 and March 7, 1993 and that he was unlawfully discharged on March 7. The specifications asset a backpay period continuing until April 25, 1993, and tips at $300 per week, however, the Respondent claims that the correct tip amount is $126 per week. As noted above, because of Gerrity's heart condition the General Counsel now stipulates a cutoff date of March 22, 3 days after he was incapacitated. It otherwise is show that Gerrity usually required working 50 to 60 hours per week and that he worked for the Respondent much of 1992. His 1992 Federal tax return indicates Gerrity earned a total of $18,773 in wages: including $3295 in unemployment benefits.

III. DISCUSSION

It is well established that the only burden on the General Counsel in a backpay proceeding is to show the gross amount of backpay due, and that the finding of an unfair labor practice presumes that some backpay is owed, see *Hacienda Hotel & Casino*, 279 NLRB 601 (1986).

Here, the Respondent does not challenge the backpay computation except to the extent the specifications list asserted additional tip income for Gerrity, Jenkins, and Purcell, however, it otherwise questions their availability for work or reasonable efforts to find work.

As stated by the Board in *Fabi Fashions*, 291 NLRB 586 (1988):

A discriminatee is required to make a reasonable search for work in order to mitigate loss of income and the amount of backpay. *Lizdale Knitting Mills*, 232 NLRB 592, 599 (1977). The Board and the courts hold however, that in seeking to mitigate loss of income a backpay claimant is "held . . . only to reasonable exertions in this regard, not the highest standard of diligence. . . . The principle of mitigation of damages does not require success, it only requires an honest good faith effort. . . ." *NLRB v. Arduini Mfg. Co.,* 394 F.2d 420, 422–423 (1st Cir. 1968); *NLRB v. Madison Courier*, 472 F.2d 1307 (D.C. Cir. 1972). The Board and the courts also hold that the burden of proof is on the employer to show that the employee claimant failed to make such reasonable search. *NLRB v. Midwest Hanger Co.*, 550 F.2d 1101 (8th Cir. 1977), or that he willfully incurred loss of income or was otherwise unavailable for work during the backpay period. *NLRB v. Pugh & Barr, Inc.*, 231 F.2d 588 (4th Cir. 1956); *NLRB v. Miami Coca Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966). Moreover, in applying these standards, all doubts should be resolved in favor of the claimant rather than the respondent wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068 (1973).

> What constitutes a good-faith search for work depends on the facts of each case In this regard the Board that in broad terms a good faith effort requires conduct consistent with an inclination to work and to be self supporting and that such inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment. Circumstances include the economic climate in which the individual operates, his skill and qualifications, his age, and his personal limitations.

In *Madison Courier, Inc.,* supra, the court also stated at 1318, that:

> In order to be entitled to backpay, an employee must at least make "reasonable efforts to find new employment which is substantially equivalent to the position [which he was discriminatorily deprived of] and is suitable to a person of his background and experience.

Here, discriminatee Babich obtained employment as a taxi driver, which is a substantially equivalent position to the position of limousine driver that he held with the Respondent. The specifications for Babich, who was offered reinstatement on January 17, 1994, are as follows:

	WKS/QTR.	AVG. WKLY ERNGS	GROSS BACKPAY	INT. ERNGS	NET BP
IQ 93	4.6	$566.16	$2,604.34	$0.00	$2.604.34
2Q	13	566.16	7,360.08	!,353.00	6,007.08
3Q	13.2	566.16	7,473.31	7,085.60	387.71
1Q	2.2	56.16	1,245.55	488.69	756.99
TOTAL					$9,755.99

As can be seen above, the interim employment that Babich obtained did not immediately reach the level of earnings he enjoyed with the Respondent. It is well established, however, that once a discriminatee has embarked on a legitimate course of interim employment, there is no duty to search for more lucrative interim employment, nor to engage in the most lucrative interim employment. See *F. E. Hazard, Ltd.*, 303 NLRB 839 (1991). Otherwise, the earnings were almost equivalent by the last quarter of 1993, when his own business had become established. Under these circumstances, I find that Babich's interim employment as a tax driver did not constitute willful failure to mitigate his losses, and, I conclude that Respondent has failed to meet its burden to establish that did not make reasonable efforts to find substantially equivalent interim employment.

Discriminatee Gerrity suffered a fifth heart attack at some time on March 18, 1993 (a Thursday) and it was stipulated by the General Counsel that the backpay period should toll March 22, 1993, a Monday. The pertinent specifications for Gerrity therefore would be as follows:

WKS./QTR.	HOURS	HRS./WK	WAGE/HR	BCKPY.	TIPS/WK. TIPS	GR BCKPY	NET BP
REDUCED HOURS 1Q 93							
w/e 2/28	Reg.	1.68	$2.38	$4.00	$70.20	$120.31	$120.31
	OT	9.40	4.91	46.11			
W/e 3/7	Reg.	10.93	2.38	26.01	129.00	201.12	201.12
	OT	9.40	4.91	46.11			
DISCHARGE							
1Qa 93	3.8 Reg.	37.93	2.28	343.04	300.00	818.25	818.25
	3.8 OT	9.40	4.91	175.21			

The reduced hours amounts are not contested and because Gerrity was incapacitated a week after he was terminated on Wednesday March 10, 1993, I find that he is entitled to 1-week pay calculated at the weekly figures provided for a total gross and net backpay of $1,139.68. (Otherwise, I find that the tip claim of $300 is less than that asserted for Jenkins and Purcell and is reasonable, see the following discussion on the tip issue).

The backpay specifications for Jenkins show no interim earnings and asserted tip at $360 a week. Purcell's specifications show interim earnings only during the 3d quarter of 1993 ($2,200.65), and asserted tips at $325, a week.

Admittedly, the discriminatees in this case did not report all of their tip earnings to the Internal Revenue Service, however, an admission of underreporting tips to the IRS does not preclude previously underreported tips from being considered and included in a backpay award. Accordingly, if the credible evidence otherwise establishs that the discriminatees received tips in excess of those reported to the IRS, then the backpay will include such tips. See *Hacienda Hotel & Casino*, 279 NLRB 601 (1986) and *Original Oyster House,* 281 NLRB 1153 (1986).

Here, the record supports an inference that the employer utilized a "fiction" that the employees accurately reported any tips received in excess of the preallocated amount designated by the Respondent. This "fiction" allowed the employer to have a record for governmental reporting purposes that would show its reliance on a reportable amount that would limit its responsibility for anacillany tax payments, while, at the same time, shifting the responsibility for the accurate reporting of additional tips to the drivers.

As pointed out by the General Counsel, employers also are responsible for payroll taxes and therefore the lower the reported earnings, the lower the employer's payroll tax liability. Here, the Respondent's witness acknowledged that there are various taxes to be paid by the Employer based on reported income. Like employees, employers who fail to report their employees' full earnings also can benefit from the underreporting and also have an incentive not to to disclose those earnings in full. Here, I find that the Respondent had such an incentive and in fact actually acknowledged in its memo to drivers during the union campaign which stated that employees "make many times" their hourly wage when "tips" (and other items), are factored in. Accordingly, I find that both the employees and the Respondent had offsetting interest in underreporting actual tip income.

The Board does not condone such conduct, however, any denial or reduction in actual backpay because of this could undoubtedly frustrate the objections of the Act by undermining the deterrent effect fo the monetary burden imposed on wrong doer. Thus, the lack of a full backpay remedy would make employees who make less than minimum wage plus substantial tip income susceptible targets for employers who are tempted to frustrate the employees' exercise of their Section 7 rights, see *Airport Park Hotel*, 306 NLRB 857, 860 (1992). Here, the Respondent offers an estimate of tips at least half of that suggested in the specifications but otherwise does not explain how they were calculated. Otherwise, both Jenkins and Purcell testified that their tips were higher ($450 a week and $50 to $80 a day, respectively), than reported.

While the evidence is less than overwhelming, under these circumstances, I am not persuated that the compliances figures for weekly tips of $360 for Jenkins and $325 for Purcell are unreasonable or inaccurate. This is especially true, inasmuch as the record otherwise shows that Jenkins was recognized by the Respondent as being in the top 5 percent of its highest paid drives. The reported tips, relied upon by the Respondent, clearly are not an accurate reflection of the actual tip income received.

Accordingly, I find the discriminatees' testimony to be believable and I conclude that the General Counsel has established a sound and reasonable basis for the figures set forth in the compliance specification and I also find that as Respondent has failed to offer convincing evidence that tip earnings were lower.

Turning to the issue of the adequacy of the discriminatees' search for interim employment, I find that Jenkins testified

credibly that be began searching for work immediately after his termination in May by visiting places where he thought he might get hired, checking the newspapers and "networking" in order to find employment. He specifically applied for driving positions at Enchantment Limousine, Jonathan's Limousine, Trump Castle Casino, Harrah's Casino, and Show Boat Casino. He sent out letters and resumes, answered a number of employment ads, and also sought other employment in the human resources field.

Jenkins had no interim earnings but I do not believe that his lack of success is indicative of a willful or unreasonable search for employment that was related to his concurrent utilization of his time while unemployed for the care of his mother. Both Jenkins and Purcell were contemporaneously searching for driver positions, which, as noted above, are substantially equivalent and suitable positions, and Purcell also was unsuccessful even in the absence of any tangential circumstance regarding his availability. I otherwise find that Purcell did find and accept a short term job as a truckdriver (which is reflected in his interim earning under employment for Joule Technical Services), and I find that he made a reasonable search for work, including work at the Tropicana, where he was eventually hired in early 1994 and where he is still employed. While Jenkins efforts and availability may be less than impressive, his efforts were ultimately successful and, when he found full time employment in January 1994 after a little more than two full quarters of unemployment, he was able to make other arrangements for his mother's care. I therefore conclude that he was availabale for work during the backpay period and that he made a good-faith effort and did not willfully incur loss of income.

I otherwise find that the Respondent has failed to meet its burden in this regard and I conclude that Jenkins and Purcell are entitled to receive the net backpay set forth in the specifications.

The specifications for Pizzutillo are not disputed and, under these circumstances, I further concluded that the gross backpay computations in the backpay specifications are the most accurate possible estimates of backpay and that Respondent has failed to establish any reasonable alternative basis for a diminution of damages. Accordingly, total backpay owed the discriminatee by Respondent, exclusive of interest, is as follows: Louis Babich - $9,755.99, Glen Gerrity - $1,139.68, Victor Jenkins - $22,507.74, Joseph Pizzutillo - $108.24, and Henry Purcell - $17,296.73.

[Recommended Order omitted from publication.]